STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY, as Subrogee of PHAEDRA RESTAURANT CORPORATION, d/b/a CHEDDAR'S,

Plaintiff-Not Participating,

v

DE LAU FIRE AND SAFETY, INC., DUTCHER ELECTRIC, INC., LANSING BOARD OF WATER AND LIGHT, MAGNA ELECTRIC, INC., and MICHIGAN FOOD SERVICES, INC.,

Defendants-Not Participating,

and

LISA LONG, d/b/a MICHIGAN MOBILE WASH,

Defendant/Third Party Plaintiff-Appellee,

v

THOMAS COLTHURST, d/b/a SOUTHWEST MICHIGAN PRESSURE WASHING, ,

Third Party Defendant-Not Participating,

and

AUTO OWNERS INSURANCE COMPANY,

Third Party Defendant-Appellant.

UNPUBLISHED
August 17, 2006

No. 268754
Ingham Circuit Court
LC No. 03-002107-CZ

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Appellant appeals as of right from an order granting summary disposition in favor of appellee pursuant to MCR 2.116(C)(9) and (C)(10). Appellant claims it had no duty to defend appellee in the original lawsuit filed against appellee regarding a fire at a Cheddar's restaurant. We agree. Thus, we reverse the trial court's grant of summary disposition in favor of appellee and remand for entry of judgment in favor of appellant.

A motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Such a motion should be granted when, "except for the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005), quoting MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(9) is also reviewed de novo. *Allstate Ins Co v JJM*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Summary disposition under MCR 2.116(C)(9) is proper if the defenses asserted are clearly untenable as a matter of law so that no factual development could possibly deny a plaintiff's right to recovery. *Wheeler v Shelby Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

It has long been established that, in a lawsuit against an insurance contract policy holder, if the allegations "against the policy holder even arguably come within the policy coverage, the insurer must provide a defense" even if the claim is groundless or frivolous. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-551; 550 NW2d 475 (1996). While appellant challenges the continued vitality of that rule, we need not reach that question. Assuming that the duty to defend continues to exist as it has traditionally been understood, appellant had no duty to defend in this case.

The duty to defend depends on a plaintiff's allegations in a complaint against an insured. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137; 610 NW2d 272 (2000). Any doubt regarding whether a complaint alleges liability covered under a policy must be resolved in favor of the insured. *Id*. The original plaintiff's complaint in this case alleged that appellee's agent did not clean the ducts as required because he brought the wrong cleaning equipment to Cheddar's on January 2, 2001, and did not return with the proper equipment to do the job before the fire. Cheddar's used the ducts by turning on the fans January 3, 2001, manifestly for its normal kitchen operations. Appellant's insurance contract specifically exempts completed work from coverage and defines completed work as work that "has been put to its intended use" and also provides that "[w]ork that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed." Looking at the plain language of the contract, it is clear that, because the exhaust hood fans were on, the exhaust ducts had been put to their intended use, making that work "complete" under the contract. Therefore, in our view, it was not even arguable that this cleaning did not fall under the policy exclusion. Thus, appellant had no duty to defend appellee in the underlying action.

In light of our conclusion that appellant had no duty to defend appellee in the underlying action, appellant is also not liable to appellee for any amount of the judgment, any interest on that judgment, or any attorney fees.

We reverse the grant of summary disposition to appellee and remand to the trial court for entry of judgment in favor of appellant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot